BRUNEI REPORTS

MURNI BIN HJ. MOHAMED TAHA v. PUBLIC PROSECUTOR

[A.Cr. J. (Roberts C.J.) September 23, 1982]

[Bandar Seri Begawan – Criminal Appeal No. 10 of 1982]

Criminal law and Procedure – Criminal breach of trust by army paymaster – Appeal against conviction only – Sentences too low – Joinder of charges – Elements of charges – Penal Code (Brunei Cap. 22), ss. 403, 405 & 406 – Criminal Procedure Code (Brunei Cap. 7), ss. 164, 165, 166, 167, 171 & 285(e) – State Financial Regulations – Evidence Ordinance, (1950 F.M.) s. 114.

Penal Code (Brunei Cap. 22), ss. 403, 405 & 406 – Criminal breach of trust – Dishonest misappropriation – State Financial Regulations – Sentence.

The appellant, a paymaster in Tutong Camp of the Royal Brunei Malay Regiment, was charged with three offences of criminal breach of trust under section 405 of the Penal Code and punishable under section 406 thereof, and three alternative charges of dishonest misappropriation under section 403 of the Penal Code. He was found not guilty on the 2nd charge and its alternative. He was convicted on the 1st and 3rd charges and was sentenced respectively to one month's imprisonment and five months' imprisonment. The appellant appeals only against conviction on the 1st and 3rd charges. The evidence shows that as paymaster he was entrusted in 1978 and 1979 with substantial sums of public money in relation to which he was the accounting officer. As a result of indents signed by the appellant, the Treasury issued cheques to him to be encashed by him for payment of serving soldiers, and it was his duty to balance payments shown in the Acquittance Rolls, and the amount of unpaid money returned to him against the amount of the cheques which had been drawn by the Treasury and cashed by him at the bank. It was discovered that there were total cash deficiencies for 1978 of $6,761.75, the amount in the 1st charge and of $49,030.05, the amount in the 3rd charge, under which the magistrate was satisfied that the amount should be reduced by $7,071.71.

In his defence, the appellant sought to throw the blame on other members of his staff. He said on a number of occasions, cheques had been cashed by members of his staff and not by himself. He also raised the issue of joinder of charges.

Held, dismissing the appeal: (1) the evidence shows a design by the appellant to cheat the Treasury by converting to his own use various sums of money returned to him by way of unpaid balances. Each of the occasions on which he converted money was in furtherance of a general purpose which falls within the same transaction, *i.e.* a series of misappropriations springing from a single design to convert public money to his own use;

(2) to establish the offence of criminal breach of trust, it is not sufficient merely to show a dishonest misappropriation of funds entrusted to the defendant. If that is all that can be established, there may be an offence under section 403 of the Code, but not under section 405. To satisfy the requirements of section 405, the prosecution must also show that the misappropriation was in violation of a direction of law as to the manner in which the trust is to be discharged or of an express or implied legal contract which he has made concerning the discharge of the trust;

(3) although the defendant could not be said to have appropriated the money entrusted to him in violation of any direction of law, he was violating a term of his contract of employment as a public servant which obliged him to follow the State Financial Regulations which had been administratively introduced throughout the service;

(4) there was no suggestion of any oblique motive or any impropriety or attempt to conceal evidence on the part of the prosecution. Section 114 of the Evidence Ordinance should not be applied;

(5) the decision of the magistrate was correct and the appeal against conviction must be dismissed.

Obiter dictum: "... [the accused] was well advised not to appeal against the sentences imposed upon him. In my view, these were far too low. I consider that about six months on the first charge and 12 months on the third, the sentences to run consecutively, would have been appropriate."

Cases referred to:

(1) *Jayaraman & Ors.* v. *Public Prosecutor* [1979] 2 M.L.J. 88.
(2) *Lim Yean Leong* v. *Public Prosecutor* [1940] M.L.J. 216.
(3) *Babulal Choukhani* v. *Emperor* A.I.R. 1938 P.C. 130.
(4) *Chin Choy* v. *Public Prosecutor* [1955] M.L.J. 236.
(5) *Amrita Lal Hazra* v. *Emperor* I.L.R. 42 Cal. 957.
(6) *Cheong Sik Kwan* v. *Public Prosecutor* [1959] M.L.J. 189.
(7) *Khoon Chye Hin* v. *Public Prosecutor* [1961] M.L.J. 105.
(8) *Seneviratne* v. *R.* [1936] 3 All E.R. 36.
(9) *Gurbachan Singh* v. *Public Prosecutor* [1966] 2 M.L.J. 125.
(10) *Samsuddin* v. *Public Prosecutor* [1962] M.L.J. 405.
(11) *Tan Puan Chee* v. *Public Prosecutor* [1981] 2 M.L.J. 282.

CRIMINAL APPEAL.

Alli Kawi for the appellant.

Ivan Leong (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Roberts C.J.: The appellant was charged with three offences of criminal breach of trust, contrary to section 405 of the Penal Code and punishable under section 406 of the Penal Code, and three alternative charges of dishonest misappropriation contrary to section 403 of the Penal Code.

He was found not guilty on the 2nd charge and

consequently, on its alternative. He was convicted on the 1st and 3rd charges. The Magistrate was also satisfied that the corresponding alternative charges had been proved.

The defendant was sentenced to one month's imprisonment on the 1st charge and to five months' imprisonment on the 3rd charge, the sentences to run consecutively. The defendant appeals against his conviction on the 1st and 3rd charges. He does not appeal against sentence.

Sentence

Before dealing with the 1st and 3rd charges, I should like to comment that he was well advised not to appeal against the sentences imposed upon him. In my view, these were far too low. I consider that about six months on the 1st charge and 12 months on the 3rd, the sentences to run consecutively, would have been appropriate.

Had there been an appeal against sentence, I should probably had substituted those sentences for the ones passed by the Magistrate, since both involved serious breaches of trust by a public servant entrusted with Government funds. It is open to me, notwithstanding the absence of any appeal against sentence to exercise the powers conferred on the High Court by section 285(e) of the Criminal Procedure Code, which provides that:

"On an appeal from the conviction, the High Court may uphold the conviction and maintain, reduce, or increase the sentence or alter the nature of the sentence."

Not without hesitation, I have decided not to make use of that power.

System of payments

The defendant had been serving in the Royal Brunei Malay Regiment for many years, before he was posted to the 2nd Battalion as Paymaster of Tutong Camp in 1978. In this capacity, he was entrusted in 1978 and 1979, the periods covered by the charges, with substantial sums of public money, in relation to which he was the accounting officer. The system which was adopted for the disbursement of monies from the Treasury was as follows.

The defendant, as Paymaster, indented on a payment voucher for sums which were required to pay salaries and other expenditure, for example, miscellaneous claims to which a number of references were made in the evidence. As a result of these indents signed by the defendant, the Treasury issued cheques.

The cheques were collected by, or sent to, the defendant, who went to the bank and drew the money, endorsing the cheque on the back when he did so. He took the money back to his office where he kept it in his safe until it was required for the payment of serving soldiers. Money was then divided up among the various companies in the 2nd Battalion. The representative of each company, referred to as a paying officer, was given sufficient money to meet the various sums set out in what were called Acquittance Rolls, which show the amount due to each soldier. This he used to pay the soldiers.

If the paying officer found that there remained in his hands any unpaid balances, these were returned by him to the defendant's office and handed to him, directly or through a member of his staff.

It was the duty of the Paymaster to balance payments shown in the Acquittance Rolls and the amount of unpaid money returned to him against the amount of the cheques which had been drawn by the Treasury and cashed by him at the bank.

In April 1980, the first prosecution witness, Warrant Officer Cummings, discovered irregularities in the accounts of Tutong. He found that there was no documentary evidence to show how the Paymaster, that is to say the defendant, had accounted for various cheques for miscellaneous payments which had been advanced from the Treasury. When Mr. Cummings discovered these deficiencies, he asked the defendant where the missing money was. To this the defendant replied: "I have been a foolish man. I have been covering up for someone."

Attached to the two charges, and repeated in the Magistrate's judgment were two Schedules, showing those advances which had not been accounted for, either in whole or in part. They disclose total cash deficiencies for the year 1978 of $6,761.75, the amount in the 1st charge, and of $49,030.05, the amount contained in the 3rd charge, during 1979.

However, the Magistrate was satisfied, as a result of evidence given by the defendant, that the deficiency alleged in the 3rd charge should be reduced by $7,071.71, making a total deficiency for the period covered by the 3rd charge of

$41,959.34. The deficiencies were all the balance of cheques issued by the Treasury, cashed at the bank by the defendant, followed by a handling over of the cash by the defendant to paying officers and the receipt back by the defendant of the unpaid balances. For these, the defendant never accounted.

There is nothing to show that, on any occasion in 1978 or 1979, did the defendant pay any money himself into the Treasury or the bank; nor could he trace any of the unaccounted balances, save to the extent of the $7,071.71, when an audit was carried out. No money was found in his office safe. No trace was ever found of these missing amounts.

Defence

The defendant gave evidence and called witnesses, seeking to throw the blame on other members of his staff who were in his charge and under his control and supervision. He said that on a number of occasions, cheques had been cashed by members of his staff and not by himself. This conflicted with the evidence given by the Bank Manager, who insisted that Treasury cheques were cashed only by the defendant and not by any member of his staff. The Magistrate accepted the Manager's evidence as to this.

The defendant also asserted that unspent money for miscellaneous claims was kept by various prosecution witnesses. They denied this and said that all unclaimed money was handed to the defendant. The Magistrate accepted their evidence and rejected that of the defendant.

It is true, of course, that there is no direct evidence of any misappropriation of the missing monies by the defendant. But, it is of the nature of charges of criminal breach of trust and indeed, of dishonest misappropriation of property in general, that convictions must depend upon inferences. It is seldom that a suspected person is seen removing money physically; if he is, he will probably be charged with theft. These charges essentially depend upon proving, not that the accused person was seen pocketing money, but that, taking all the evidence together, the inference is irresistible that the money which has disappeared must have been appropriated by the accused.

The Magistrate found, accepting the evidence of the various prosecution witnesses, that there was only one reasonable inference to be drawn from the facts as he found them; namely that the money which was missing, over a period of 18 months, must have been misappropriated by the defendant. On the basis of the evidence before him, this is the conclusion which he was eminently entitled to reach.

Joinder of Charges

It was argued by the defendant's counsel that the three main charges should not have been tried together. He based his submission on section 164 of the Criminal Procedure Code, which requires that:

> "For every distinct of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 165, 166, 167 and 171."

Section 165 limits the number of offences of the same kind committed within the space of 12 months from the first to the last of such offences, to three as the maximum which can be tried at one trial.

By section 165(2):

> "Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Penal Code, or of any law for the time being in force."

Section 166 on the other hand states that:

> "If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence."

The effect of these two sections was considered in *Jayaraman & Ors.* v. *Public Prosecutor.*[1] Harun J., in a criminal revision case in the High Court at Kuala Lumpur, considered sections 164 and 165 of the Malayan Criminal Procedure Code (which are in the same terms as sections 165 and 166 of the Brunei Criminal Procedure Code). He comments in relation to section 165 of the Malayan Code, (section 166 Brunei) that one trial is permissible for all offences committed by the same person arising out of the same transaction. There is no limit as to the number of charges that may be preferred against an accused person at such trial. He refers to *Lim Yean Leong* v. *Public Prosecutor,*[2] in which the Court of Appeal for Malaya held that the four exceptions (*i.e.* Brunei sections 165, 166, 167 and 171) were cumulative and not mutually exclusive. The Privy Council came to the same decision in *Babulal Choukhani* v. *Emperor,*[3] a decision by which this court is bound.

In *Chin Choy* v. *Public Prosecutor*,[4] the Malayan Court of Appeal considered the meaning of section 166. In this case, two defendants were charged with a number of offences stretching over a period of seven years. Mathew C.J. delivering the judgment of the Court, quoted *Amrita Lal Hazra* v. *Emperor*[5] which contains the following passage:

"It is not possible to frame a comprehensive formula of universal application to determine whether two or more acts constitute the same transaction; but circumstances which must bear on the determination of the question in an individual case may be easily indicated; they are proximity of time, unity or proximity of place, continuity of action and community of purpose or design."

In *Cheong Sik Kwan* v. *Public Prosecutor*,[6] the Malayan Court of Appeal had to consider the legality of a trial in which the accused was charged with seven offences, four involving criminal breach of trust and three involving the falsification of documents. The four charges of criminal breach of trust, which spanned a period from January 1955 until October 1956, alleged that the defendant had committed a criminal breach of trust in relation to a sum of cash. The main argument before the Court of Appeal was that the falsification of accounts charges should not have been joined with the breach of criminal trust charges. The point was not taken that it was wrong for the four offences of criminal breach of trust to have been joined. However, the matter was considered by Thomson C.J. in the following passages from his judgment:

(a) "The question of whether the charges could indeed be tried together did, as would appear from his judgment, occur to the mind of the learned trial Judge, but on reflection he took the view that the case was covered by section 165(i) of the Criminal Procedure Code because the alleged offences were committed in a series of acts so connected together as to form the same transaction. He accordingly refrained from intervening and allowed the trial to proceed on that basis."

(b) "In the present case the trial Judge took the view that the whole series of operations on which the charges were based was in fact a single transaction. He applied the test applied by this Court in the case of *Chin Choy* v. *Public Prosecutor* that there must be a purpose or design which was something particular and definite and he found that that test was fulfilled. He took the view that there was a settled purpose to cheat the Bank by using one particular account as the means of putting that purpose into effect and that the repetition of the same technique month after month on every occasion when one of the frauds in the series was perpetrated was the clearest possible example of a single transaction springing from a single initial design."

I am satisfied, as was the Magistrate, that the evidence shows a design by the defendant to cheat the Treasury over a substantial period by converting to his own use various sums of money which were returned to him by way of unpaid balances. Each of the occasions on which he converted money was in furtherance of a general purpose which, on the authorities I have considered, falls within the same transaction, that is to say, a series of misappropriations springing from a single initial design to convert public money to his own use.

The Magistrate set out the various elements which the prosecution must establish in a charge under section 405 at page 198 of the record. I am satisfied that his statement of these requirements is entirely accurate.

State Financial Regulations

To establish the offence of criminal breach of trust, it is not sufficient merely to show a dishonest misappropriation of funds entrusted to the defendant. If that is all that can be established, there my be an offence under section 403 of the Code, but not under section 405. To satisfy the requirements of section 405, the prosecution must also show that the misappropriation was in violation of a direction of law as to the manner in which the trust is to be discharged or of an express or implied legal contract which he has made concerning the discharge of the trust.

The Magistrate was of the opinion that the State Financial Regulations were part of the Law of Brunei. It emerged during the course of Appeal, however, that these Regulations, which were brought into force in 1955, had been revoked, with effect from January 1, 1960 by the Constitution Financial Procedure Order 1959, as read in conjunction with the Constitution Preliminary Financial Procedure Order 1959, and thus ceased to be part of the Law of Brunei from that date.

However, no government can conduct its financial affairs in good order unless its officers are bound by, and follow, financial regulations of some description, whether these are contained in legislation or whether they are the result of administrative direction.

It is clear from the evidence that the State Financial Regulations, which ceased to be law in 1960, have nevertheless, been followed as a matter of administrative practice ever since and have governed the manner in which government depart-

ments and public servants must deal with public funds entrusted to them.

Any public servant, which term includes members of the Royal Brunei Malay Regiment, is subject to whatever government orders and regulations may be in force from time to time, in so far as these are applicable to his personal circumstances or to the work which he is doing in the public service. These regulations, therefore, although they do not have the force of law, bind all public servants if adopted administratively, as they have been.

The defendant was Paymaster at Tutong Camp during the relevant period. He was an accounting officer and as part of the terms of service on which he in common with all public servants was employed, he was obliged to follow these regulations. They are, therefore, part of a contract of service between himself and the Government of the State. It is worth referring to illustration (e) attached to section 405 of the Penal Code which provides:

"A, a Magistrate or a clerk in a Government Office, is entrusted with public money, and is either directed by law, or bound by a contract, express or implied with the Government to pay into a certain treasury all the public money which he holds. A dishonestly appropriates the money. A has committed criminal breach of trust."

I am satisfied, therefore, that although the defendant could not be said to have appropriated the money entrusted to him in violation of any direction of law, he was violating a term of his contract of employment as a public servant which obliged him to follow the State Financial Regulations which had been administratively introduced throughout the service.

Evidence Ordinance

It was argued that the Prosecution should have called every paying officer who had received money during the period when the defendant was paymaster at Tutong, to show that they had in fact handed back the unpaid balances.

There is, however, ample authority for the proposition that it is wholly a matter for the prosecution to decide whom they wish to call as witnesses. If they do not call every possible witness, they run the risk of leaving gaps in their case, but the discretion remains theirs.

In *Khoon Chye Hin* v. *Public Prosecutor,*[7] Thomson C.J. delivering the judgment of the Malayan Court of Appeal, quotes Lord Roche in the Privy Council case of *Seneviratne* v. *R.*[8] in the following passage:

"Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candour and fairness on the part of those conducting prosecutions; but at th same time they cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence.

Thomson C.J. also refers to another Privy Council case, in which Lord Thankerton observed that the prosecutor has a discretion as to which winesses should be called for the prosecution and that the Court will not interfere with the exercise of that discretion, unless it could be shown that the prosecutor has been influenced by some oblique motive.

In *Gurbachan Singh* v. *Public Prosecutor*[9] Yong J., in the High Court of Malaya, quoted from the judgment of the Court of Appeal of Malaya in *Samsuddin* v. *Public Prosecutor,*[10] where the Court of Appeal observed:

"It is clear from these authorities that the prosecutor has a discretion and also that if he does not call material witnesses who are available he runs the risk of having the presumption in illustration (g) to section 114 of the Evidence Ordinance raised against him. In the present case there was no attempt at concealment, no suggestion, as was said by Lord Thankerton in the case of *Adel Muhammed El Dabba* v. *Attorney-General for Palestine* that the prosecutor has been influenced by some oblique motive. The witnesses were freely offered to the defence and in our opinion the presumption did not arise."

Yong J. goes on:

"In our present case there was no attempted concealment and no evidence that there was oblique motive. The witnesses were offered to the defence not once, but twice. I hold that the presumption under the said 114(g) does not arise."

The defendant's counsel placed some weight on *Tan Puan Chee* v. *Public Prosecutor,*[11] in which the conviction was quashed because the prosecution has failed to call as witnesses, two persons who, the Judge of Appeal was satisfied, would have given evidence against the prosecution on the crucial issue in the case. These witnesses were neither called nor made available to the defence. For these reasons, the judge quashed the conviction saying: "Failure of the prosecution to call them, in my view, should attract the adverse presumption under section 114(g) of the Evidence Act."

The Evidence Ordinance of what was then the Federation of Malaya was imported into the Law of Brunei by the Malayan Laws Adoption Ordinance (Cap. 3). Section 114 is in these terms:

"The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case."

There follows a large number of illustrations, among them, illustration (g):

"that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it."

How should this section be applied? First, it is important to note that it is a matter of discretion for a Court as to whether or not it presumes the existence of any fact. Secondly, as a matter of practical common sense, it is a section which ought to be narrowly construed. If it were broadly construed, it would impose on the prosecution an obligation to call many numbers of witnesses to give identical, or almost identical evidence and would gravely fetter the principle that it is for the prosecution to decide which witnesses to call.

The cases to which I have referred suggest that the section should only been used where what was called an oblique motive on the part of the prosecution could be detected. If there is any evidence that the prosecution is failing to call, or make available to the defence, a witness who is likely to give evidence hostile to the prosecution case, this might well be a proper occasion on which the court would adopt a presumption under section 114 of the Evidence Ordinance.

In this case, there was no suggestion of any oblique motive, or of any impropriety or attempt to conceal evidence, on the part of the prosecution. I do not consider that these are circumstances in which section 114 should be applied.

There were various other points raised by counsel for the defendant, either in his written Notice of Appeal or verbally, I do not consider any of them to be of sufficient validity to warrant separate consideration in the course of this judgment.

History of Trial

The Magistrate's judgment is long, careful and fair, and shows an admirable group of a complex series of facts and of difficult pieces of evidence. It is even more to his credit that he was able to achieve such clarity in face of the very long period which elapsed between the beginning of the trial and its conclusion.

The defendant was first brought before the Court and charged on April 1, 1981. The trial was fixed for April 15. On April 15, it was refixed for hearing on June 17, when it was again adjourned for hearing until July 8. On July 8, a plea was taken but the case was adjourned to July 16. At last, on July 16, some evidence was taken. The trial was then postponed, for reasons that are not apparent on the record, until December 7, when the trial continued for six working days, on the last of which it was adjourned, at the request of the defence, until March 30 and 31, 1982.

On the second of these two days, the defendant gave evidence. The case was adjourned until May 3 and 6 when the evidence was concluded. Judgment was given on June 2, but the passing of the sentence was postponed until June 29, for a perfectly proper reason.

From the first appearance of the defendant before the Court until sentence, fifteen months elapsed. The first day on which evidence was taken was July 16, 1981; the last day on which evidence was taken was May 6, 1982, a period of nine and a half months, although, during that period, seem to have been only eleven actual trial days.

To conduct a trial in this manner is unfair to the prosecution; it is even more unfair to the defendant; and it is extremely unfair on the Magistrate. Courts here should establish and follow the general practice that once a date is fixed for a trial, the trial should be begun on that date and should be continued without interruption until it is finished.

Courts will retain a discretion to postpone if good grounds are shown to them, but postponements or adjournments should be very exceptional and should be granted by Magistrates only if they are satisfied that there is no practical alternative.

It follows from all that I have said that I am satisfied that the decision of the Magistrate was correct and that the appeal against conviction on the two charges must be dismissed.

Appeal dismissed.

Solicitors: *Alli Kawi & Co.*